

**STATE OF MAINE
SUPREME JUDICIAL COURT**

**IN RE: PROPOSED AMENDMENT)
 TO THE MAINE RULES OF)
 PROF. CONDUCT - RULE 8.4(g))**

**Supplement to Joint Comment Opposing Adoption of
Proposed New Rule of Professional Conduct 8.4(g)**

The Maine licensed attorneys submitting this *Supplement to Joint Comment Opposing Adoption of Proposed New Rule of Professional Conduct 8.4(g)* include attorneys who earlier filed a *Joint Comment* that addressed the proposed new Rule in detail. Since then, on June 26th the Supreme Court of the United States announced its decision in *National Institute of Family and Life Advocates, d/b/a NIFLA, et al. v. Becerra, et al.*, 585 U.S. ____ (2018) in which it devoted a part of its majority opinion to the subject of whether and to what extent professional speech – including the professional speech of attorneys – is protected under the First Amendment to the Constitution of the United States. The Supreme Court’s recent discussion of professional free speech protection is relevant to a Rule of Professional Conduct being considered in Maine that purports to restrict the professional speech of attorneys. For that reason, the Maine licensed attorneys listed below respectfully submit this *Supplement to Joint Comment Opposing Adoption of Proposed New Rule of Professional Conduct 8.4(g)* for the Court’s

consideration.

The Supreme Court Has Reaffirmed that Professional Speech of Attorneys is Constitutionally Protected

As noted in our previous *Joint Comment*, citizens do not surrender their First Amendment speech rights when they become attorneys, even with respect to their professional speech. *NAACP v. Button*, 371 U.S. 415 (1963) (“a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights”). See also *Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 771 S.W.2d 116, 121 (Tenn. 1989) (an attorney’s statements that were disrespectful and in bad taste were nevertheless protected speech and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney’s First Amendment rights. “[W]e must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights”); *Standing Committee on Discipline of U.S. Dist. Court for Central District of California v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995) (the substantive evil must be extremely serious and the degree of imminence must be extremely high before an attorney’s utterances can be punished under the First Amendment).

The ABA itself has acknowledged this very principle in an amicus brief it filed in the case of *Wollschlaeger, et al. v. Governor of the State of Florida, et al.*, 797 F.3d 859 (11th Cir. 2015). In its brief the ABA denied that a law regulating

speech should receive less scrutiny merely because it regulates “professional speech.” The ABA wrote,

*On the contrary much speech by . . . a lawyer . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived ‘political agenda’ of which it disapproves. That is the central evil against which the First Amendment is designed to protect. Simply put states **should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . .** Indeed, the Supreme Court has never recognized ‘professional speech’ as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created (Emphasis added).*

The Supreme Court reaffirmed this principle in *National Institute of Family and Life Advocates, d/b/a NIFLA, et al. v. Becerra, et al.*, 585 U.S. ____ (2018). Addressing California’s claim that professional speech was subject to state regulation, the Court stated that it was not presented with any persuasive reason for treating professional speech as a unique category exempt from ordinary First Amendment principles.

Instead, the Court stated that

[T]his Court’s precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, see Reed, 576 U.S. at ____ (slip op., at 10 (discussing Button, supra, at 438)); . . . The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals’ speech “pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.” Turner Broadcasting, 512 U.S., at 641.

In short, the Court concluded that, for any law purporting to regulate the speech of professionals – such as the professional speech of lawyers – to pass constitutional muster, the law must serve a compelling state interest and be narrowly tailored to serve that interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2222 (2015) (laws that target speech based on its communicative content are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests). But proposed Rule 8.4(g) does neither.

A. The Proposed Rule Does Not Serve A Compelling Government Interest

The government has a legitimate interest in protecting the public and the legal profession from unscrupulous lawyers, *People v. Morley*, 725 P.2d 510, 514 (Colo. 1986), and from those who do not possess the qualities of character and the professional competence requisite to the practice of law. *In re Disciplinary Action Against Jensen*, 418 N.W.2d 721, 722 (Minn. 1988). The government also has a legitimate interest in preventing prejudice to the administration of justice. Indeed, these are the legitimate purposes of the Rules of Professional Conduct, which is a prescriptive code that can be enforced by loss of professional license. But, although the government may have an interest in preventing discrimination and harassment to the extent failing to do so would either prejudice the administration of justice or render an attorney unfit to practice law, there is no authoritative

support for the proposition that the government has a compelling interest in preventing "discrimination" or "harassment" by attorneys generally – especially (as pointed out in our previously filed *Joint Comment*) in light of the fact that the terms "discrimination" and "harassment" – standing alone – are unconstitutionally vague terms, and when the Rule directly affects attorneys' constitutionally protected free speech rights.

Because the proposed Rule does not serve a compelling government interest, it fails strict scrutiny analysis.

B. The Proposed Rule Is Not Narrowly Tailored

Given that the government's legitimate interest in prohibiting attorney speech is limited to preventing discrimination and harassment that, if not proscribed, would either prejudice the administration of justice or render an attorney unfit to practice law, it is clear that the proposed Rule is not narrowly tailored to serve either of those interests. The Rule could be so tailored, by limiting its application only to discrimination or harassment that prejudiced the administration of justice or that rendered an attorney unfit to practice law. But the Rule is not so tailored, because the Rule prohibits "discrimination" and "harassment" without regard to whether it prejudices the administration of justice or renders an attorney unfit.

This is an unusual development under the Rules of Professional Conduct.

Indeed, as pointed out in our previous *Joint Comment*, the Rules do not even prohibit *criminal* conduct, unless the criminal conduct “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Rule 8.4(b). And yet the proposed Rule prohibits “discrimination” and “harassment” without regard to whether it prejudices the administration of justice or reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.

Because the proposed Rule is not narrowly tailored to serve a compelling government interest, it fails strict scrutiny analysis.

CONCLUSION

In light of the U.S. Supreme Court’s recent opinion in *NIFLA v. Becerra*, *supra*, the proposed Rule 8.4(g), which targets constitutionally protected speech, fails strict scrutiny analysis. For that reason, the proposed Rule 8.4(g) should be rejected.

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